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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: **AUG 23 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center. Subsequent motions to reopen and reconsider were dismissed by the director. The petitioner then appealed to the Administrative Appeals Office (AAO). The AAO dismissed the appeal. The petitioner filed a motion to reopen and reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be granted and the appeal will again be dismissed.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. The AAO finds that the motion meets the requirements for a motion to reopen. The record shows that the motion is properly filed, timely, and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

In its previous decision, the AAO found that the petitioner had established the ability to pay from 2004 – 2007, but not in 2002 and 2003.

As noted in the regulation, the petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. On motion, in support of its continuing ability to pay the proffered wage, the petitioner submitted its tax returns from 2008 – 2011, and IRS Forms W-2 issued to the beneficiary in 2010, 2011 and 2012. The IRS Forms W-2 from 2010 – 2012 indicate that the beneficiary was paid in excess of the proffered wage in those years.¹ For 2008 and 2009, however, the petitioner did not submit either IRS Forms W-2 or 1099-MISC issued to the beneficiary. Instead, the petitioner claims that it deposited the beneficiary's salary into his bank account directly, and submitted copies of the beneficiary's 2008 and 2009 bank statements. The beneficiary's bank statements are not one of the forms of evidence

¹ The petitioner did not submit its tax return for 2012. Without the evidence required by 8 C.F.R. § 204.5(g)(2), however, either an annual report, federal tax return or audited tax statement, the 2012 IRS Form W-2 will not be accepted as evidence of the petitioner's ability to pay the proffered wage in that year.

required to establish the ability to pay the proffered wage under 8 C.F.R. § 204.5(g)(2), such as an annual report, federal tax return or audited tax statement. As such, the AAO will not accept the bank statements as evidence of the petitioner's ability to pay in 2008 and 2009.²

The petitioner's tax returns for 2008 and 2009 do not show that the petitioner had the ability to pay out of its net income or net current assets. In 2008, the petitioner's net income (loss) is reflected on its IRS Form 1120 as (\$21,397); its net current assets (liabilities) are (\$9,646). In 2009, the petitioner's net income (loss) is (\$3,411); its net current assets are \$6,426.

Upon review, the petitioner has established the ability to pay the beneficiary in 2004 - 2007 and 2010 and 2011. The petitioner has not established its ability to pay in 2002, 2003, 2008, 2009 and 2012.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonogawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonogawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

On motion, the petitioner admits that the petitioner did not establish the ability to pay the proffered wage in 2002 and 2003. The petitioner, through counsel, asserts that it has established its ability to pay the proffered wage through an analysis of the petitioner's totality of circumstances. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). Counsel supports the motion with supporting documents including federal income tax returns; bank statements; screen prints of internet websites related to the petitioner; certificate of achievement; certificate of random drug program enrollment; screen print from the Better Business Bureau; an insurance policy certificate; certificates of title, apportioned registration cab cards; and tax returns from 2008 - 2011. The petitioner states that the

² The source of the online transfers into the beneficiary's bank accounts is not identified.

global recession affected its profits in 2008 and 2009, and that it paid the beneficiary through direct deposits into the beneficiary's checking account. The petitioner states that it has established the ability to pay through an analysis of the totality of circumstances.

The petitioner states that extraordinary circumstances in 2002 and 2003 caused its inability to pay the proffered wage in those years. The petitioner states that it was a new company in 2002, and had start-up costs that will not recur. The AAO disagrees. The costs of starting a new company are not uncharacteristic business expenses. The petitioner's first year expenses were predictable and characteristic of a new company; the fact that its net income and net current assets were insufficient to pay the difference between the wage paid and the proffered wage in 2002 does not excuse its obligation to pay the proffered wage as of the priority date and continuing until the beneficiary may obtain permanent residence. Similarly, the truck repair cost in 2003 was an ordinary business expense for a trucking company that owns its own fleet.³

The petitioner asserts that its income was reduced during the recession, but that over time its annual income has increased five-fold from 2002 to 2011, that the numbers of its employees and subcontractors have increased, and that it is a leader in its field. The petitioner's IRS Forms 1120 indicate that it paid its employees \$2,030 and its subcontractors \$87,051 in 2002 and in 2011 paid its employees \$37,174 and its subcontractors \$241,817. These numbers establish that the petitioner had no employees in 2002 and one in 2011. The record does not establish the wages paid to the subcontractors and/or the duties these workers performed for the petitioner. If the subcontractors earned the same as the proffered wage, the petitioner paid the equivalent of one full time and one part time subcontractor in 2002, and approximately four such workers in 2011. While these figures indicate that the petitioner is a going concern and is steadily growing, considering the totality of the circumstances the petitioner has not established that it had the ability to pay the difference between the wage paid and the proffered wage in 2002 and 2003, \$27,270.80 and \$22,724.80 respectively, and the full wage in 2008, 2009 and 2012, \$60,132.80. The petitioner has not established its reputation within its industry, nor the occurrence of any uncharacteristic business expenditures or losses during the years in question. The petitioner's revenues, payroll, officer compensation and other financial information contained on its tax returns are not sufficient to establish its ability to pay the proffered wage despite its shortfall in net income and net current assets. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date onwards.

Beyond the decision of the director, the record in this case also lacks conclusive evidence as to whether the petition is based on a bona fide job offer or whether a pre-existing business relationship may have influenced the labor certification. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on

³ The petitioner's 2003 IRS Form 1120 indicates that after insurance reimbursement, the petitioner's total loss due to the truck accident was \$6,348.

a *de novo* basis). In the instant case, USCIS records indicate that in 2008 the beneficiary became the 100% shareholder of the petitioner.

The petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. See *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). Where the person applying for a position owns the petitioner, it is not a *bona fide* offer. See *Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), the commissioner noted that while it is not an automatic disqualification for an alien beneficiary to have an interest in a petitioning business, if the alien beneficiary's true relationship to the petitioning business is not apparent in the labor certification proceedings, it causes the certifying officer to fail to examine more carefully whether the position was clearly open to qualified U.S. workers and whether U.S. workers were rejected solely for lawful job-related reasons. That case relied upon a Department of Labor (DOL) advisory opinion in invalidating the labor certification.

In *Hall v. McLaughlin*, 864 F.2d 868 (D.C. Cir. 1989), the court affirmed the district court's dismissal of the alien's appeal from the Secretary of Labor's denial of his labor certification application. The court found that where the alien was the founder and corporate president of the petitioning corporation, absent a genuine employment relationship, the alien's ownership in the corporation was the functional equivalent of self-employment. Given that the beneficiary is the 100% owner of the petitioner, the facts of the instant case suggest that this may too be the functional equivalent of self-employment. For this additional reason, the appeal will be dismissed.

The observations noted above suggest that further investigation, including consultation with the Department of Labor may be warranted under our consultation authority at 204(b) of the Act, in order to determine whether any family, business, or personal relationship between the petitioner and the beneficiary represents an impediment to the approval of any employment-based visa petition filed by this petitioner on behalf of this beneficiary.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion is granted. The appeal is dismissed. The decision of the AAO dated March 25, 2013 is undisturbed.